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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 668

PAUL BLACKFORD, WILLIAM W. BLACKFORD, CARROLL D. HAGER, ROBERT HAGER, RONALD L. HAWK, GEORGE NIELSEN, HANS NIELSEN AND MARSHALL WEDDLE, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

KENNETH C. WEST,
1009 Scarritt Building,
Kansas City 6, Missouri and
WALTER A. RAYMOND,
1200 Dierks Building,
Kansas City 6, Missouri,
Counsel for Petitioners.

WILLIAM W. COCHRANE, JR.,
Kansas City, Missouri, and
WILLIAM FARMER,
Wichita, Kansas,
Of Counsel.

INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 4

Statement 4

Specification of Errors to Be Urged 10

Reasons for Granting the Writ 11

(1) The ruling of the Court of Appeals, if permitted to stand, will extend jurisdiction under the National Stolen Property Act (18 U. S. C. A. 415, 1948 Ed., Title 18, Sec. 2314, and Title 18, U. S. C. A. 418a, 1948 Ed., Title 18, Sec. 371) so as to authorize convictions in federal courts under said Act in all cases where it is charged goods of a value of $5,000.00 or more are involved, regardless of the lack of proof of such value 13

(2) The holding of the Court of Appeals (R. 455-456) that there was evidence of the actual transportation in interstate commerce of wheat of a value of $5,000.00 or more (which the jury failed to find) is based on conjecture, speculation or surmise and is wholly insufficient to sustain convictions under time-honored requirements of proof in criminal cases laid down by this court and other courts of appeal 15

Conclusion 18

Appendix 19

Table of Authorities Cited

CASES

Backun vs. United States, (4 Cir.) 112 F. 2d 635, 639 ... 11, 13
Buchanan vs. United States, (8 Cir.) 164 F. 2d 15, 17 ... 12
Carlson vs. United States, (10 Cir.) 187 F. 2d 366 ... 11, 12
Fred A. Carlson et al. vs. United States of America, 72 Sup. Ct. Rep. 22—Advance Sheet, November 15, 1951 ... 11
Direct Sales Co. vs. United States, 319 U. S. 703, 711, 63 S. Ct. 1265, 1269 ... 17
Franklin vs. Skelly Oil Company, (10 Cir.) 141 F. 2d 568, 571 ... 17
Gargotta s. United States, (8 Cir.) 77 F. 2d 977, 981 16
Hammond vs. United States, 127 F. 2d 752, 753 ... 17
Kordel vs. United States, 335 U. S. 345, 348-349, 69 S. Ct. 106, 109 ... 14
Russell vs. United States, (8 Cir.) 119 F. 2d 686, 688 ... 13
United States vs. Buchalter, (2 Cir.) 88 F. 2d 625, 626 ... 16
United States vs. Fenwick, (7 Cir.) 177 F. 2d 488, 489 18
United States vs. Litberg, (7 Cir.) 175 F. 2d 20, 21 ... 17
Viereck vs. United States, 318 U. S. 236, 243, 63 S. Ct. 561, 564 ... 14

STATUTES

Title 18, U. S. C. A. 415 (1948 Ed., 18 U. S. C. A., Sec. 2314) ... 4, 11, 13, 19
Title 18, U. S. C. A. 418a (1948 Ed., 18 U. S. C. A., Sec. 371) ... 4, 11, 13, 20
Title 18, U. S. C. A. 413-419 ... 19

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PAUL BLACKFORD, WILLIAM W. BLACKFORD, CARROLL D. HAGER, ROBERT HAGER, RONALD L. HAWK, GEORGE NIELSEN, HANS NIELSEN AND MARSHALL WEDDLE, PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Paul Blackford, William W. Blackford, Carroll D. Hager, Robert Hager, Ronald L. Hawk, George Nielsen, Hans Nielsen and Marshall Weddle, Petitioners, pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, in the cases of *Paul Blackford et al., Appellants,* v. *United States of America, Appellee,* numbers 4316 to 4323, inclusive (which cases were tried below as one case and were consolidated and heard as one appeal in the United States

Court of Appeals for the Tenth Circuit), entered on February 5, 1952, affirming the judgments of conviction entered by the United States District Court for the District of Kansas on Count One of the Indictment.

OPINIONS BELOW.

No opinion was filed by the trial Court. The opinion of the Court of Appeals is not yet reported, but is set out at pages 451 to 456 of the printed Record herein.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed were entered on February 5, 1952 (R. 456-460). All Petitioners on February 15, 1952, timely filed their Joint and Separate Petition for Rehearing (R. 468, 461-468). Said Petition for Rehearing was denied February 21, 1952 (R. 469). On February 27, 1952, the Court of Appeals entered an order staying the mandates for 30 days (R. 469).

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 2101 (d), and Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated by this Court February 8, 1946.

QUESTIONS PRESENTED.

1. Whether Federal jurisdiction may be extended by permitting the jury to infer an agreement to transport goods in interstate commerce of a value of $5,000.00 or more theretofore stolen or obtained by felonious fraud, when the jury fails to find actual transportation of goods

of such value so obtained, and there is no evidence of an express agreement to so transport goods of such value.

2. Whether the rule that to support a verdict of guilty circumstantial evidence must be such as to exclude every reasonable hypothesis but that of guilt is not violated by the holding that there was a shortage of $5,000.00 worth of wheat or more based on admittedly inaccurately kept books, a reconstructed hypothetical inventory made 26 months later by a government agent and with the shortage claimed yet well under the outside tolerance of 3% recognized and ordinarily allowed by Federal Warehouse Examiners to cover shrinkage and possible errors in inventory.

3. Whether the rule that a verdict of guilty in a criminal case may not rest on conjecture, speculation or surmise, or on a mere choice of probabilities is not violated by the holding that the evidence here is sufficient to sustain the convictions.

4. Whether in the opinion of the Court of Appeals herein difficulty of government proof is not substituted for actuality of proof so as to deprive defendants of the benefit of the rule that an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt.

5. Whether the opinion of the Court of Appeals herein in the above respects does not relax the time-honored requirements of proof in criminal cases and extend federal jurisdiction thereof so far as to bring this opinion into direct conflict with the decisions of this Court and the Courts of Appeals in the other circuits.

STATUTES INVOLVED.

Title 18, U. S. C. A. 415 (1948 Ed., 18 U. S. C. A., Sec. 2314).

Title 18, U. S. C. A. 418a (1948 Ed., 18 U. S. C. A., Sec. 371).

(Said statutes are set out in the appendix to this petition.)

STATEMENT.

On March 22, 1950, a joint indictment in two counts was filed against the petitioners in the United States District Court for the District of Kansas, charging them with violations of the National Stolen Property Act (R. 4-11).

Count One of the Indictment charged the defendants with conspiracy to violate the provisions of Section 415, Title 18, United States Code, in that they conspired, confederated and agreed to transport and cause to be transported in interstate commerce wheat of a value exceeding $5,000.00 theretofore stolen, feloniously converted, and taken feloniously by fraud. The Indictment set forth twenty overt acts alleged to have been committed in furtherance of the conspiracy (R. 4-11, Opinion, R. 451-452).

Count Two of the Indictment charged the defendants with the substantive offense of transporting in interstate commerce approximately 9,871 bushels and 20 pounds of wheat of a value of more than $5,000.00, theretofore stolen, feloniously converted and taken feloniously by fraud with knowledge of such facts (R. 11, Opinion, R. 452).

At the close of all the evidence the defendants filed a joint and several motion for judgments of acquittal, which

the Court overruled as to both counts and as to all defendants (R. 431, Opinion, R. 452).

The case was then submitted to the jury on both counts and as to all defendants, resulting in verdicts of guilty against all the defendants (Petitioners here) on Count One and the jury was unable to agree and failed to reach a verdict on Count Two of the Indictment (R. 13-15, 448-449, Opinion, R. 452).

Petitioners filed their joint and several motion for judgment of acquittal with alternative motion for a new trial on March 7, 1951 (R. 15-19). On March 27, 1951, Petitioners' motion for judgment of acquittal or in the alternative for a new trial was denied by the Court (R. 19).

Each of the Petitioners was, on the aforesaid date, given a sentence. Petitioners William W. Blackford, Hans Nielsen and Carroll D. Hager were each sentenced to serve a term of five years in the penitentiary and Petitioners Robert Hager, Ronald L. Hawk, George Nielsen and Marshall Weddle were each sentenced to serve a term of three years in the penitentiary (R. 19-20).

Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit (R. 28-30). The cases were there consolidated and heard as one appeal (R. 451).

Petitioners' appeals were principally on the grounds there was no federal jurisdiction and no proof of the *corpus delicti* in that there was no substantial evidence of any actual transportation in interstate commerce of wheat of a value of $5,000.00 or more theretofore stolen, feloniously converted or taken feloniously by fraud, and no direct evidence whatsoever of any agreement to transport in interstate commerce wheat of a value of $5,000.00 or more theretofore so wrongfully obtained (Opinion, R. 452, 455, 456). Petitioners presented and kept alive these grounds

in their motions for directed verdicts of acquittal (R. 12, 16), motion for new trial (R. 17), points to be relied upon in Court of Appeals (R. 1-3) and motion for rehearing in the Court of Appeals (R. 461-468).

The Government's case was directed to proof of fraudulent manipulation of loading spouts (other than the weighing spout which was the only spout equipped with an automatic scale) in the elevator of the McCoy Grain Company in Sublette, Kansas, so that wheat ran from such spouts into defendants' trucks which was not weighed and for which they did not pay; and to proof of an alleged shortage of more than $5,000.00 worth of wheat for that season in said elevator (R. 452-456).

The opinion of the Court of Appeals fails adequately to state the facts bearing on the issues presented. Detailed references are therefore made to the record throughout as well as to the opinion of the Court of Appeals.

The opinion of the Court of Appeals states (R. 454):

> "Four individuals testified that at some time during the latter part of June, or the early part of July, 1948, the exact date of which they could not state, they were in and around this elevator and saw large trucks being loaded in the driveway of this elevator and that wheat was flowing into the trucks from more than one grain spout. The purchased wheat was weighed by automatic scales located near the top of the elevator. As it was weighed it was released through one certain grain spout into the trucks. The spouts that these witnesses referred to were shown to include others than the one from the scales."

Not one of such witnesses was able to identify a single one of the defendants as being involved in any of the above occurrences (R. 205, 206, 208, 210, 216, 228, 229, 239). None of the witnesses testified as to the length

of time they saw wheat being loaded from other than the weighing spout and none of them attempted an estimate of the amount of wheat so loaded. It is unlikely that one of the witnesses, Maxine Ellsaesser, saw a truck belonging to defendants as the truck she saw was loading about noon (R. 227, 231) and the opinion states (R. 454-455): "The trucks on all occasions appeared for loading late in the afternoon * * *." Another of such witnesses, Jack French, was there on June 30, around 6 or 7 o'clock (R. 203, 204, 209, 210). Two other government witnesses were there at approximately the same time as French and one of them got up in the trucks and watched the loading and yet neither of them saw anything wrong (R. 191, 194, 197, 198, 199, 196, 202, 204).

The opinion of the Court of Appeals further states (R. 455):

> "There was reliable evidence to the effect that the Sublette elevator was short approximately 6,000 bushels of wheat over the harvest period of 1948, and that the shrinkage should not have been more than 1,700 bushels. Because of the factors over which there is no control, it is impossible to determine with certainty shrinkage of wheat handled by an elevator. In some types of elevators the average appears to be about one-half of one per cent of the wheat handled, while in others it is much less."

There is a tolerance of 3% recognized and allowed by the Federal Warehouse Examiners to cover shrinkage and possible errors in inventory, which in this case amounts to 7,202 bushels (R. 140, 141, 144, 382, 383, 407).

The regular auditor of the McCoy Grain Company (R. 100, 392, 393) and the regular warehouse examiner for the United States Government (admitted to be an experienced and competent examiner of 12 years service)

who examined and measured near the time in question (R. 66, 100, 106, 110, 378, 379) found only a normal shortage for the season.

The only basis for the statement of the Court of Appeals that there was a shortage of approximately 6,000 bushels is the testimony of Mr. Waldie, Warehouse Examiner in charge of administration, who without request from anybody and on his own volition, after the first trial of this case and shortly before instant second trial, went to the McCoy Elevator at Sublette and did some special work (R. 107, 108, 109, 112, 113, 114, 117). The Waldie tests were made 26 months after the occurrences involved in this prosecution (R. 139, 145, 108, 109, 112, 117). It was not claimed the wheat was the same (R. 140). Waldie weighed the wheat in only one of six tanks (R. 101, 106, 114, 115, 116). He undertook to determine for himself only two things, the effective depth of the bins and the "pack factor," as to all other matters he took the figures of the regular examiner made on the ground near the time involved (R. 140, 141). Under the changed factors of depth and pack as determined by Mr. Waldie 26 months later he reconstructed the regular examiners' inventory of August 10, 1948, by increasing the shortage 3½ times (R. 139, 140, 141). That was the only evidence of a shortage in any such amount as 6,000 bushels in the McCoy Elevator.

It would appear the jury did not accept the Waldie reconstructed inventory as they failed to agree on a verdict on the substantive count.

The records of the McCoy elevators were poorly kept. The records of the two separate elevators thereof were intermingled (R. 302, 303). The scale tickets failed to show in which of two elevators 17,107 bushels of wheat was

dumped (R. 365). It was difficult if not impossible to tell where the wheat went (R. 364, 396, 397, 408). Occasionally wheat would be transferred by truck from one elevator to the other (R. 122, 123, 187, 188, 190). During the period covered by the government audit, January 10, to August 10, 1948, there were sales of ten truck loads of wheat out of elevator No. 2 to other buyers than these defendants (R. 123, 124, 299, 300, 301, 302). The McCoy Elevator probably suffered a greater loss from spoilage in 1948 than normal (R. 368, 369).

The only other evidence having any tendency to prove wheat of a value in excess of $5,000.00 in value was stolen or obtained by felonious fraud in Sublette, Kansas, is the evidence that defendants sold in Woodward, Oklahoma, wheat of a value of $21,119.21 more than the value of the wheat bought at Sublette (R. 332, Opinion, R. 453). In making the trip from Sublette, Kansas, to Woodward, Oklahoma, Petitioners traveled over 150 miles through good wheat country during the harvest season and could have procured additional wheat at any place they chose to stop (R. 42-46, Opinion, R. 456). None of the Petitioners testified at the trial of this case. The only evidence tending to negative the acquisition of such additional wheat is evidence of an extra judicial admission of defendant Ronald Hawk eighteen months later which was admitted only against him (R. 285, 442, 443). We submit such evidence, therefore is not substantial evidence to prove beyond a reasonable doubt additional wheat was not added between Sublette, Kansas, and Woodward, Oklahoma.

The jury returned verdicts of guilty on the First or conspiracy count against all defendants but failed to agree on the Second or substantive count (R. 13-15, 448, 449).

SPECIFICATION OF ERRORS TO BE URGED.

THE COURT OF APPEALS ERRED:

1. In holding the defendants' joint and several motion for judgments of acquittal at the close of all the evidence was properly denied.

2. In holding there was substantial evidence that wheat of a value of $5,000.00 or more in value was stolen or obtained by felonious fraud in Sublette, Kansas, by the defendants.

3. In holding there was substantial evidence that the defendants, or any two of them, did conspire, confederate or agree to transport in interstate commerce and did transport in interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by felonious fraud.

4. In holding circumstantial evidence equally or more consistent with innocence was substantial evidence sustaining verdicts of guilty.

5. In holding the Waldie hypothetical reconstructed inventory made 26 months after the occurrences here involved, which the jury apparently did not accept, was substantial evidence there was a shortage of approximately 6,000 bushels of wheat in the McCoy Elevator at Sublette for the harvest season of 1948.

6. In holding a shortage well within the 3% tolerance regularly allowed by the United States Warehouse Examiners for shrinkage and possible errors in the inventory was substantial evidence of theft or criminal conversion sufficient to prove such fact beyond a reasonable doubt.

7. In holding there was sufficient substantial evidence of a conspiracy to transport and actual transportation in

interstate commerce wheat of a value of $5,000.00 or more theretofore stolen or obtained by felonious fraud to invoke the jurisdiction of the federal Court.

8. In affirming the District Court as to the convictions of all the Petitioners on Count One of the Indictment.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals extends federal jurisdiction under the National Stolen Property Act (Title 18, U. S. C. A. 415 and 418a) far beyond any previous decision, with the exception of the majority opinion of this same Court of Appeals in the case of *Carlson* v. *United States,* (10 Cir.) 187 F. 2d 366, in which case a petition for a Writ of Certiorari to this Court was filed and a motion for rehearing therein overruled October 8, 1951, during the present term of this Court (*Fred A. Carlson et al.* v. *United States of America,* 72 Sup. Ct. Rep. 22—Advance Sheet, November 15, 1951) and is still within the control of and subject to correction at the hands of this Court.

Backun v. *United States,* (4 Cir.) 112 F. 2d 635, 639:

> "Congress has seen fit to limit criminal responsibility under the statute to cases where the stolen property transported in interstate commerce is of a value of $5,000.00 or more; and, to sustain a conviction under it, there must be substantial evidence that the stolen property transported was of such value. Where the value is less, the prosecution for possessing or dealing with stolen property must be had in the state courts and under state law."

In the Statement, *supra,* in this Petition we believe we have demonstrated there is no substantial evidence

wheat of a value of $5,000.00 or more, theretofore stolen or obtained by felonious fraud was actually transported in interstate commerce. That issue was submitted to the jury under Count Two (wrongly we contend) and the evidence was so weak and unconvincing that the jury was unable to agree upon a verdict on that Count (R. 12-15, 448-449).

In the case of *Buchanan* v. *United States*, (8 Cir.) 164 F. 2d 15, the Court said (l. c. 17):

> "The proof of the swindle was clear, but there, as here, the basis for federal jurisdiction, that is, proof, of an actual or an agreed upon transportation in interstate commerce of the money stolen in an amount in excess of $5,000.00 and an overt act to effect that object, was lacking."

There is in this record no evidence of "an agreed upon transportation in interstate commerce" of wheat in excess of $5,000.00 in value. The opinion does not purport to rest upon such an agreement but upon an actual transportation of the jurisdictional amount so wrongfully obtained (Opinion, R. 455-456). The opinion herein has relaxed the time-honored requirements of proof in criminal cases, as pointed out in the minority opinion in the case of *Carlson* v. *United States*, (10 Cir.) 187 F. 2d 366, 374. This is a criminal statute and the liberties of these Petitioners are at stake. The opinion of the Court of Appeals herein violates the rules of statutory construction of criminal statutes and brings such opinion into conflict with the decisions of this Court and the Court of Appeals of other circuits. The issues here are of great public interest and importance and have never been directly passed on by this Court in the particular form here presented. They directly involve a question of federal jurisdiction and of an extension of the law of conspiracy beyond any previous decision involving

the National Stolen Property Act, with the exception of the majority opinion in the *Carlson case, supra.* The confusion and unsettled condition which these decisions create can only be ended finally and conclusively by this Court taking jurisdiction and determining the matter by a controlling and authoritative decision.

(1) The ruling of the Court of Appeals, if permitted to stand, will extend jurisdiction under the National Stolen Property Act (18 U. S. C. A. 415, 1948 Ed., Title 18, Sec. 2314, and Title 18, U. S. C. A. 418a, 1948 Ed., Title 18, Sec. 371) so as to authorize convictions in federal courts under said Act in all cases where it is charged goods of a value of $5,000.00 or more are involved, regardless of the lack of proof of such value.

The statute invoked by the plaintiff (Title 18, U. S. C. A. 415, 1948 Ed., Title 18, Section 2314) specifically limits prosecutions thereunder to:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities or money, of the value of $5,000.00 or more theretofore stolen, feloniously converted, or taken feloniously by fraud, etc."

Congress saw fit to limit prosecutions in the federal courts to cases where the stolen property transported in interstate commerce was of a value of $5,000.00 or more, leaving prosecutions where the values involved were less to the state courts. *Backun* v. *United States,* (4 Cir.) 112 F. 2d 635, 639; *Russell* v. *United States,* (8 Cir.) 119 F. 2d 686, 688.

The verdicts of conviction below are affirmed on the basis of there being substantial evidence of the actual transportation of wheat of a value of $5,000.00 or more theretofore stolen or feloniously converted (R. 455-456).

That very issue was submitted to the jury under the Second Count of the Indictment. We most earnestly urge the evidence was insufficient to justify such submission and such submission was erroneous. Furthermore the jury failed to agree on a verdict on Count Two and yet the Court of Appeals affirms the convictions on the theory the jury should have returned verdicts of conviction under Count Two. It is not even asserted in the opinion there was any evidence of an agreement to transport wheat of such value so wrongfully obtained but the opinion rests wholly on such actual transportation which the jury failed to find and as to which we most earnestly contend there was no substantial evidence.

This violates the rule of statutory construction stated by this Court in the case of *Kordel* v. *United States,* 335 U. S. 345, 348-349, 69 S. Ct. 106, 109, as follows:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States* v. *Resnick,* 299 U. S. 207, 57 S. Ct. 126, 81 L. Ed. 127; *Kraus & Bros.* v. *United States,* 327 U. S. 614, 621, 622, 66 S. Ct. 705, 707, 708, 90 L. Ed. 894), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated."

It also, we believe, violates the rule stated by this Court in the case of *Viereck* v. *United States,* 318 U. S. 236, 243, 63 S. Ct. 561, 564:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

We submit this extension of federal jurisdiction beyond the language of the statute and the relaxation of time-

honored requirements of proof in criminal cases demonstrated by the opinion of the Court of Appeals herein is a matter of great public interest and importance calling for review and corrected by this Court.

(2) The holding of the Court of Appeals (R. 455-456) **that there was evidence of the actual transportation in interstate commerce of wheat of a value of $5,000.00 or more (which the jury failed to find) is based on conjecture, speculation or surmise and is wholly insufficient to sustain convictions under time-honored requirements of proof in criminal cases laid down by this court and other courts of appeal.**

As pointed out in the Statement, *supra*, in this Petition where page references to the record are given the Books of the McCoy Elevator were poorly kept; the records of the two elevators were intermingled; the scale tickets failed to show into which elevator 17,107 bushels of wheat was dumped during this period; occasionally truck loads of wheat were transferred from one elevator to the other; the elevator probably had a greater loss from spoilage during 1948 than normal; during the period covered by the Government audit there were sales of ten loads of wheat to other buyers than these defendants; the regular auditor of the McCoy Grain Company and the regular Warehouse Examiner for the United States who examined and measured near the time in question found only a normal shortage for the season; the only basis for a claim of a 6,000 bushel shortage was the testimony of the Government witness Waldie who was the Warehouse examiner in charge of administration. Twenty-six months after the occurrences complained of he, of his own volition, went to this elevator and made some computations as to effective depth of bins and the pack factor and then hypothetically worked out a reconstructed inventory which he

testified showed a shortage of approximately 6,000 bushels of wheat, but even that was below the 3% tolerance for shrinkage and to cover possible errors in the inventory which in this case would allow a tolerance of 7,202 bushels (R. 144). The alleged shortage of approximately 6,000 bushels of wheat of a value of $5,000.00 or more has no support in the testimony other than the Waldie computation. The jury evidently was unable to swallow Waldie's testimony as they were unable to agree on the substantive count of the Indictment.

In the case of *Gargotta* v. *United States,* (8 Cir.) 77 F. 2d 977, the Court said (l. c. 981):

> "The burden of proof was on the government to prove his guilt beyond a reasonable doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties."

In the case of *United States* v. *Buchalter,* (2 Cir.) 88 F. 2d 625, the Court said (l. c. 626):

> "Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to acquittal until proved guilty as charged beyond a reasonable doubt. Here there were, indeed, many suspicious circumstances to lead to the conclusion that Buchalter was guilty, but there was no substantial evidence to overcome the presumption of innocence, and so it was error to deny his motion."

We believe the above quotation accurately sums up the situation here and demonstrates these convictions should be reversed for want of substantial evidence to sustain them.

We submit the holding of the Court of Appeals here offends against the long-established rule which the same

Court so well stated in *Franklin* v. *Skelly Oil Company,* (10 Cir.) 141 F. 2d 568, as follows (l. c. 571):

> "The mere choice of probabilities does not constitute evidence, but creates only conjecture and surmise on which a verdict of a jury cannot stand."

We submit the opinion of the Court of Appeals also offends against the rule so well stated in *Hammond* v. *United States,* 127 F. 2d 752, where the Court of Appeals for the District of Columbia said (l. c. 753):

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him. *Isbell* v. *United States,* (8 Cir.) 227 Fed. 788, 792."

The application of such a test to the evidence here will reveal its utter insufficiency to sustain verdicts of conviction.

The opinion also does violence to the rule stated in *United States* v. *Litberg,* (7 Cir.) 175 F. 2d 20, as follows (l. c. 21):

> "In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof."

In the case of *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711, 63 S. Ct. 1265, the Court said (l. c. 1269):

> "* * * charges of conspiracy are not to be made out by piling inference on inference."

We can best sum up our argument on this point by quoting from *United States* v. *Fenwick*, (7 Cir.) 177 F. 2d 488, as follows (l. c. 489):

> "The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed (Citing cases)."

The government here has failed to make such proof; citizens are deprived of their liberty on convictions not legally justified and these cases cry out for relief at the hands of this court.

CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH C. WEST, and
WALTER A. RAYMOND,
Counsel for Petitioners.

WILLIAM W. COCHRANE, JR., and
WILLIAM FARMER,
Of Counsel.

APPENDIX.

Title 18, United States Code.

Section 413. National Stolen Property Act; citation.

Sections 413-419 of this title may be cited as the "National Stolen Property Act" (May 22, 1934, Ch. 333, Sec. 1, 48 Stat. 794).

Section 414. Same; definitions.

When used in Sections 413-419 of this title—

(a) The term "interstate or foreign commerce" shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory or the District of Columbia. * * * (May 22, 1934, Ch. 333, Sec. 2, 48 Stat. 794).

Sec. 415. Same; transportation of stolen or feloniously taken goods, securities, or monies; transportation of articles used in counterfeiting.

"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000.00 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000.00 or by imprisonment for not more than ten years, or both: * * * (May 22, 1934, Ch. 333, Sec. 3, 48 Stat. 794; Aug. 3, 1939, Ch. 413, Sec. 1, 53 Stat. 1178)."

Sec. 418a. Same; conspiracy.

"If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of sections 413-419 of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by sections 413-419 of this title (May 22, 1934, Ch. 333, Sec. 7, as added Aug. 3, 1939, Ch. 413, Sec. 5, 53 Stat. 1179)."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	10
Conclusion	14

CITATIONS

CASES:

Carlson v. *United States*, 187 F. 2d 366, certiorari denied, 341 U. S. 940	13
Delaney v. *United States*, 263 U. S. 586	13
Kann v. *United States*, 323 U. S. 88	13
Pinkerton v. *United States*, 328 U. S. 640	13
United States v. *Johnson*, 319 U. S. 503	13
United States v. *Rabinowich*, 238 U. S. 78	13

STATUTES:

Act of June 25, 1948, c. 645, 62 Stat. 683, Sec. 21	2
National Stolen Property Act, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178:	
Sec. 3 (18 U.S.C. (1946 ed.) 415)	3
Sec. 7 (18 U.S.C. (1946 ed.) 418a)	2
18 U.S.C. 371	2
18 U.S.C. 2314	3

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 668

PAUL BLACKFORD, WILLIAM W. BLACKFORD, CARROLL D. HAGER, ROBERT HAGER, RONALD L. HAWK, GEORGE NIELSEN, HANS NIELSEN, and MARSHALL WEDDLE, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 451-456) is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 5, 1952 (R. 456-460), and a

joint petition for rehearing was denied on February 21, 1952 (R. 469). The petition for a writ of certiorari was filed on March 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioners' convictions for conspiracy to violate the National Stolen Property Act.

2. Whether the convictions on the conspiracy count are invalid because the jury were in disagreement as to convictions on the substantive count.

STATUTE INVOLVED

Section 7 of the National Stolen Property Act, 53 Stat. 1179 (18 U.S.C. (1946 ed.) 418a), provided:[1]

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

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[1] This statute was repealed by Act of June 25, 1948, c. 645, 62 Stat. 683, sec. 21, effective September 1, 1948, and is now covered generally by 18 U.S.C. 371.

Section 3 of the National Stolen Property Act, 48 Stat. 794, as amended, 53 Stat. 1178 (18 U.S.C. (1946 ed.) 415),[2] provided in pertinent part as follows:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *

STATEMENT

An indictment in two counts (R. 4-11), filed in the United States District Court for the District

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[2] This section is now covered by 18 U.S.C. (Supp. IV) 2314, which reads in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
>
> • •
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

It will be noted that the present language eliminates the clause, "theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin."

of Kansas, charged that from about June 30 to July 7, 1948, petitioners (1) conspired to violate the National Stolen Property Act by agreeing to transport in interstate commerce a quantity of wheat, exceeding $5,000 in value, theretofore stolen, feloniously converted, and taken feloniously by fraud; and (2) transported in interstate commerce from Kansas to Oklahoma 9,871 bushels of wheat of value exceeding $5,000 knowing the same to have been stolen, converted and taken by fraud.

Following a trial by jury, petitioners were found guilty on the conspiracy count (R. 13-15), and were sentenced to terms of imprisonment ranging from 3 to 5 years. Fines of $5,000 and $10,000, respectively, were imposed upon two of the petitioners.[3] The jury failed to agree on the second count (R. 448). Upon appeal, the convictions on the first count were unanimously affirmed (R. 456-460).

The evidence adduced by the Government disclosed a basic scheme, carried out five times during the week in question, whereby petitioners brought their tractor trailer trucks, of approximately 1,000 bushel capacity apiece (R. 192-193,

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[3] William W. Blackford, Hans Nielsen, and Carroll D. Hager were sentenced to five years' imprisonment. Blackford and Nielsen were also fined $5,000 and $10,000, respectively. Execution of Hager's sentence was suspended and he was placed on probation for five years. The remaining petitioners were sentenced to three years' imprisonment (R. 20-28).

201, 273) to the grain elevators of the McCoy Grain Company at Sublette, Kansas, and while buying and causing approximately 500 bushels to be loaded on each truck through the spout connected with the scales (R. 43-46), obtained additional wheat through other spouts, unnoticed by the two employees of the grain company during the loading operation (R. 62-63, 181-182, 205-206, 210, 220, 223-224, 237-238, 241, 262). Petitioners then sold the wheat in Oklahoma at a rate less per bushel than they paid in Kansas, but for higher aggregate totals because of the additional wheat for which they did not pay. They paid $25,081 for the 12,110 bushels in Kansas, divided among 24 truckloads, and sold from the same 24 truckloads in Oklahoma, approximately 22,000 bushels, for which they received approximately $20,334 more than the total purchase price (R. 43-46, 295-296).

In formal written admissions of fact, petitioners conceded that they owned transportation equipment or were engaged or employed in the business of buying, selling, and trucking grain from June 20, 1948, through July 7, 1948, in Kansas and adjoining states (R. 47). Between the afternoon of June 29 and early morning of June 30, five of petitioners signed applications for entry of trucks at the Syracuse, Kansas, port of entry, naming the three other petitioners as owners of the trucks, and claiming that their destination was Deerfield, Kansas, to pick up wheat to be transported to Dal-

las, Texas (R. 47-49). On June 30, 2,530 bushels of wheat were purchased at Sublette, Kansas, at $2.07 per bushel and loaded on trucks driven by the same five petitioners (R. 43); the same trucks appeared in Woodward, Oklahoma, that midnight or early in the morning (see R. 274), July 1, with 3,219-2/3 bushels of wheat, of which the Sublette wheat was admitted to be a part, and which was sold by one of petitioners at the lesser rate of $2.02 and $2.03 per bushel (R. 43). Purchases at Sublette and sales of larger quantities at lower prices at Woodward were repeated in substantially the same fashion on four more trips arriving and leaving Sublette on July 1, July 4, July 5, and July 6, respectively.[4] While the sales were admittedly

[4] *Petitioners' admissions of purchases and sales* (R. 43-46):

Date	*Purchases at Sublette, Kansas.*		*Sales at Woodward, Oklahoma.*	
	Bushels	*Price*	*Bushels*	*Price*
Jun. 30	2,530	$5,327.00		
Jul. 1			3,219 + 40 lbs.	$6,529.38
Jul. 1	2,540	5,257.80		
Jul. 2			4,178 + 30 lbs.	8,451.05
Jul. 4	2,510	5,191.20		
Jul. 5			3,913 + 40 lbs.	7,697.86
Jul. 5	2,030	4,180.80	5,100 + 20 lbs.	10,098.65
Jul. 6	2,500	5,125.00		
Jul. 7			4,579 + 10 lbs.*	12,639.01*
	12,110	$25,081.00	21,991 + 20 lbs.*	$45,415.95*

(cont'd next page)

made in Woodward, Oklahoma, petitioners claimed, in each of their applications upon reentry into Kansas, that the trucks came from Amarillo, Texas, and were to return there. In the case of the applications of July 2, petitioners listed a town other than Sublette as the place from which wheat was to be picked up (R. 50-58).

Petitioners further admitted that petitioner W. W. Blackford, "on various dates during 1948 and at various places," including Kansas, "used the name E. L. Long, Long Grain Company of Joplin, Missouri and J. Long in connection with the purchase and sale of wheat, although he never at any time maintained offices in Joplin and to his knowledge there was not a concern known as the Long Grain Company in Joplin, Missouri, or a

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	Bushels	*Price*
	21,991 + 20 lbs.	$45,415.95
	12,110	25,081.00
Wheat sold in Oklahoma for which payment was not made in Kansas:	9,881 + 20 lbs.	$20,334.95

* The July 7 sale in Oklahoma included wheat from a sixth truck. The total sale was admitted by petitioners in the amount of $13,335.07 (R. 46), from which the Government computations deducted the price of the wheat in the largest of the six loads (R. 296). The Government totals of 21,991 bu. 20 lbs., and $45,415.95 (R. 295) accordingly reflect a smaller figure for the July 7 sale than that admitted by petitioners.

man known as E. L. Long or J. Long in the grain business at Joplin, Missouri" (R. 50).

Testimony adduced by the Government disclosed that the purchases at Sublette began on June 30, 1948, when petitioner William Blackford, representing himself as "Mr. Long" of the Long Grain Company, arranged for the purchase of wheat. On the same day, the five tractor trucks arrived (R. 61) accompanied by certain of the petitioners later identified in court by the manager (R. 64). Wheat to be sold and loaded on a truck was required to be weighed in an automatic scale at the top of the elevator; it then flowed into a bin from which there was only one spout to the truck alleyway (R. 62-63, 182). However, there were eleven additional spouts in the alleyway, and the spouts, with possibly one exception, were not within the range of view of the two operators of the elevator, since one operator was required to be at the top of the elevator with the scales and the other was required to be at a point where the grain was started on a conveyor belt to the scales (R. 181-182, 262). The spouts could be opened or closed by ropes hanging down into the driveway or against one wall, and they could run from 108 to 120 bushels per minute (R. 262). Four witnesses, persons in the neighborhood who had looked into the truck alleyway during part of the loadings, testified that they had seen grain pouring into the trucks from a spout or spouts other than the spout from the scales (R.

205-206, 210, 220, 223-224, 237-238, 241).[5] A further witness testified that petitioners Hans Nielsen and William Blackford, in seeking to have him join them in September of 1948, had explained to him how they had "made a pretty good hit" at Sublette by getting into the bins by means other than the regular hopper (R. 338-339).[6] Other witnesses placed various others of the petitioners at the scene and times of the various loadings (R. 182-183, 193, 200).

The Government further adduced testimony showing a shortage of 5,718 bushels at the Sublette elevator (R. 79, 121) of which only 1,700 bushels could be attributed to normal shrinkage (R. 83, 86).[7] Four elevator operators with experience

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[5] The only grain loaded out of the elevator into a truck, other than the 24 loads of petitioners, was a load of 422 bushels for one Seigal (R. 124, 192).

[6] Petitioners sought to impugn the testimony of this witness by the fact that he had pleaded guilty to a felony in March 1950, and hoped to be released on parole in June 1951 (R. 339-343, 373-377).

[7] The shortage was computed from the date when the elevator was empty, January 19, 1948, to the date of an inventory on August 10, 1948. The amount of grain on hand on August 10, 1948, was computed by the Warehouse Examiner, in charge of administration of the U. S. Warehouse Act for the district, from an inventory and soundings taken by one of his examiners on August 10, 1948. The Warehouse Examiner, in December 1950, went to the elevator to establish the pack factor and the effective depth factor employed in the inventory by more precise measurements applied to the particular elevator, rather than by the less accurate estimates of these factors employed in the routine inventories taken by the examiners (R. 104-106, 108-109, 113, 139-143, 145, 417).

covering 123 elevators confirmed this maximum estimate (R. 125, 133, 137, 148, 154, 159, 162, 167-168, 170, 173-175).

Petitioners did not take the stand or adduce any evidence showing that they obtained the additional wheat from any sources other than the extra spouts of the Sublette elevator.

ARGUMENT

1. Petitioners' argument is in effect a contention that the evidence is insufficient to support the verdict. While to some extent they attack the sufficiency of the evidence to show that the wheat was stolen (Pet. 6), the main thrust of their argument is that the evidence does not establish that the conspiracy embraced the transportation of stolen wheat of the requisite jurisdictional amount of $5,000. The facts, as set forth, in the statement, completely refute this contention.

Petitioners' own written admissions of fact, formally filed in this case show that in repeated trips petitioners paid from $2.05 to $2.07 per bushel for wheat and immediately thereafter sold it at the lower rate of $1.97 to $2.03 per bushel (*supra,* p. 6 and fn. 4). Such a transaction could be profitable only if more wheat were actually taken than was paid for. Petitioners paid for an aggregate of only 12,110 bushels in Kansas and appeared promptly thereafter in Oklahoma with an aggregate of nearly 22,000 bushels for which they obtained $20,334.95 more than any payments

shown to have been made by them (*supra,* p. 6 and fn. 4). The jury could properly conclude that the extra wheat came from the extra spouts at the Kansas elevator which were not supposed to be opened to petitioners' trucks but were seen to be so opened by four witnesses (*supra,* pp. 8-9).[8] The jury could also properly conclude from these facts that the value of the wheat which petitioners planned to steal was more than $5,000. In fact, the July 5th transaction itself showed an excess of more than $5,000. (See fn. 4, pp. 6-7.)

Petitioners adduced no evidence whatsoever of any source for the 9,881 bushels of extra wheat. They now intimate in their brief (Pet. 9) that they might have bought the additional wheat en route. The jury was not, however, required to speculate on that remote possibility in the absence of the proof which could have been so easily adduced in such an event. And a showing of some additional purchases would still fall far short of explaining the repeated practice of buying wheat at one price per bushel and selling it later that night at a lesser rate.

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[8] Petitioners' attempt to impute some significance to the fact that the particular witnesses who observed the extra spouts in operation did not identify petitioners (Pet. 6-7) is devoid of merit in light of petitioners' own admissions of their presence at the scene at the time in question (*supra,* pp. 5-6), the identification of petitioners at the time and place by other witnesses (*supra,* pp. 8-9), and the uncontradicted testimony that except for one purchase of 420 bushels by one Seigal, no other truck sales were made from the elevator (*supra,* fn. 5, p. 9).

In view of their own admissions which more than sufficiently established the jurisdictional value of the stolen wheat, petitioners' attempt to impugn the accuracy of the evidence as to the warehouse shortage is obviously unavailing. Their contention that the warehouse shortage was computed on an inventory made long after the loadings in question (Pet. 10) is without foundation. The inventory was taken August 10, 1948, and only the assumptions involved in the inventory were later corrected, employing more precise measurements and elimination of estimates employed in more routine inventories. See *supra,* pp. 9-10 and fn. 7.

The argument that a "tolerance" of three percent is "recognized and allowed by the Federal Warehouse Examiners to cover shrinkage and possible errors in inventory, which in this case amounts to 7,202 bushels" (Pet. 7) is contradicted by the testimony of the examiner in charge of administration of the United States Warehouse Act for the district comprising the southwest States, who testified that, while ordinarily an outside tolerance of three percent was recognized, when the special work that had been performed in this case was performed at a particular elevator, the stock would be invoiced within a half of one percent (R. 141-142). It is clear that on any basis, the shortage was shown to be in an amount far in excess of $5,000 in value, and thus in excess of the amount

needed to establish a conspiracy to commit a federal offense.

The evidence on the issue of the value was much clearer and more concrete than the evidence held sufficient in *Carlson* v. *United States,* 187 F. 2d 366 (C.A. 10), certiorari denied, 341 U.S. 940, also involving transportation of stolen wheat. Since the trial court and the unanimous Court of Appeals below have, on the basis of abundant evidence, sustained the jury's verdict we submit that there is no occasion for further review. See *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.

2. Petitioners' further reliance (Pet. 2-3) on the disagreement of the jury on the second count charging the substantive offense, is without merit. There is no necessary inconsistency between conviction on the conspirary count and disagreement on the substantive count. *Pinkerton* v. *United States,* 328 U.S. 640, 643; *United States* v. *Rabinowich,* 238 U.S. 78, 85; *Carlson* v. *United States,* 187 F. 2d 366, 369-370 (C.A. 10), certiorari denied, 341 U.S. 940.

CONCLUSION

No conflict of decisions or question of general importance is involved in this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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